doctrine of *res judicata* to questions of law, for had the court adopted such a rule, it would have been forced to apply one construction of the law to the parties before it, while it applied a different construction in all suits between other persons.[8]

RECENT CASES.

ADVERSE POSSESSION — WHO MAY GAIN TITLE BY ADVERSE POSSESSION — RIGHTS OF ONE INTENDING TO ACQUIRE A HOMESTEAD. — The defendant entered the plaintiff's land, thinking that it belonged to the United States, with the intention of acquiring a homestead. He remained in possession until the statute of limitations had run, when the plaintiff attempted to eject him. *Held*, that the plaintiff is barred. *Maas* v. *Burdetzke*, 101 N. W. Rep. 182 (Minn.). See NOTES, p. 380.

ALIENS — EXCLUSION OF ALIENS AS A JUDICIAL QUESTION. — The Chinese Exclusion Act of 1894 provided that the decision of the appropriate immigration or customs officers excluding an alien should be final unless reversed on appeal to the Secretary of the Treasury. The Secretary of Commerce and Labor, to whom the enforcement of the law was subsequently delegated, refused admission to the adopted children of a Chinese merchant domiciled in this country and, as such, possessed of rights under a treaty with China. *Held*, that the decision is reviewable by the federal courts. *In the Matter of Fong Yim*, 32 N. Y. L. J. 1349 (U. S. Dist. Ct., S. D., N. Y., 1905).

The precise question seems never to have been adjudicated, but the result is hard to reconcile with certain decisions of the Supreme Court. See *Lem Moon Sing* v. *United States*, 158 U. S. 538. For some consideration of the principles involved, see 17 HARV. L. REV. 488.

BANKRUPTCY — INVOLUNTARY PROCEEDINGS — PETITIONER ESTOPPED BY PARTICIPATION IN APPOINTMENT OF RECEIVER. — After a receiver had been appointed for the defendan. corporation, two of the present petitioners requested the court to appoint a co-receiver, and several months later used these receivership proceedings as a basis for petitioning the defendant into bankruptcy. *Held*, that the petitioners are estopped from instituting such proceedings. *Lowenstein* v. *Henry McShane Mfg. Co.*, 12 Am. B. Rep. 601 (U. S. Dist. Ct., Dist. of Md.).

As there is no precedent exactly in point, the court reasons from the rather doubtful analogy that one who assents to an assignment for the benefit of creditors is estopped from later setting it up as an act of bankruptcy. *In re Romanow*, 92 Fed. Rep. 510; *Simonson* v. *Sinscheimer*, 95 Fed. Rep. 948. The reasoning of these cases proceeds upon the ground that the creditor, having already agreed to one method of distribution of his debtor's property, cannot afterwards file a petition which would be virtually repudiating his former position. But the duty of a receiver is not necessarily like that of an assignee, to wind up and distribute the debtor's estate; it is primarily to preserve the property, and to carry on the business under the direction of the court. Since the receiver may not conduct the enterprise as satisfactorily as anticipated, it necessarily follows that a concurrence in his appointment is perfectly consistent with a later desire to have bankruptcy proceedings instituted. It would seem, therefore, that the petitioner could hardly be disqualified by such concurrence.

BANKRUPTCY — PRIORITY OF CLAIMS — RIGHT OF PARTNERSHIP CREDITORS TO SHARE IN INDIVIDUAL ESTATE. — A partnership of which a bankrupt had been a member was insolvent and had no solvent members surviving. *Held*, that creditors of the partnership may not participate in the bankrupt's estate until the bankrupt's personal creditors have been satisfied. *In re Corcoran*, 14 Oh. Fed. D. 294. See 17 HARV. L. REV. 132.

BILLS AND NOTES — CHECKS — EFFECT OF DEATH OF DRAWER. — The deceased on his death-bed drew a check in favor of the defendant and delivered it to him. The check was not presented to the bank until after the death of the drawer. The state claimed the funds by escheat. *Held*, that the defendant is entitled to them. *Phinney* v. *State ex rel. Stratton*, 78 Pac. Rep. 927 (Wash.).

For a discussion of the principles involved, see 17 HARV. L. REV. 104.

[8] See Boyd *v.* Alabama, 94 U. S. 645; Bernard *v.* Hoboken, 27 N. J. Law 412.

CARRIERS — CONNECTING LINES — PRESUMPTION AS TO LOST GOODS. — In an action for lost goods against the latter of two connecting carriers, the plaintiff proved delivery of the goods to the first carrier and non-delivery by the second, but gave no proof of delivery by the first to the second. *Held*, that a presumption arises that the latter carrier received the goods. *St. Louis, etc., Ry. Co.* v. *Birdwell*, 82 S. W. Rep. 835 (Ark.).

In the absence of special agreement, England, Canada, and some of the United States hold the first carrier for loss occurring anywhere before final delivery. *Muschamp* v. *Lancaster, etc., Ry. Co.*, 8 M. & W. 421; *Grand, etc., Ry. Co.* v. *McMillan*, 16 Can. Supreme Ct. 543. These jurisdictions allow no recovery from the subsequent carriers, on the theory that they are agents of the initial carrier, with which alone the shipper contracts. Most American courts, however, declare that recovery may be had directly from the carrier which loses or damages the goods; and when the last carrier is sued, raise a presumption that the default occurred on its line. *Smith* v. *New York, etc., R. R. Co.*, 43 Barb. (N. Y.) 225; *Laughlin* v. *Chicago, etc., Ry. Co.*, 28 Wis. 204. If the American rule is to be held at all, some such presumption is necessary for the protection of the public. It is no hardship on the carriers, for, if they deem it expedient, they can exact from one another receipts fixing the responsibility where it belongs. But though necessary under the American rule, the presumption seems illogical, has no basis in fact, and apparently arises as well against the first or intermediate carrier as the last. *Brintnall* v. *Saratoga, etc., R. R. Co.*, 32 Vt. 665.

CARRIERS — WHO ARE PASSENGERS — RES IPSA LOQUITUR. — The plaintiff, employed as an express messenger by a company which had contracted with the defendant railway company for the carriage of express matter and the free transportation of its employees, while in the course of his employment was injured by a derailment of the defendant's train. In the absence of any explanation of the accident, the court refused to instruct that the fact of derailment was no evidence of the defendant's negligence. *Held*, that the instruction should have been given, since the express messenger is in the position of an employee of the defendant, and the doctrine of *res ipsa loquitur* is not applicable to injuries of servants. *Chicago, etc., Ry. Co.* v. *O'Brien*, 132 Fed. Rep. 593 (C. C. A., Eighth Circ.).

Most authorities reject the first premise of this case, and regard an express messenger as enjoying a position not less favorable than that of a passenger. *Yeomans* v. *Contra Costa, etc., Co.*, 44 Cal. 71; *Fordyce* v. *Jackson*, 56 Ark. 594. Nor does it necessarily follow from the contrary cases that an expressman is protected less than a passenger, except that he may contract to assume the risk of the railway's negligence. *Cf. Baltimore, etc., Ry. Co.* v. *Voigt*, 176 U. S. 498. The second premise has also been somewhat criticised. *McCray* v. *Galveston, etc., Ry. Co.*, 89 Tex. 168. But such formal argument seems unfortunate. The doctrine of *res ipsa loquitur* rests upon common sense, and the propriety of presuming the defendant's negligence should depend on the facts of the particular case. Whether its basis be mere expediency, probability, or the defendant's peculiar knowledge of the facts, the present case seems to warrant its application. The rule has apparently made headway against the presumption favoring employers, except where the servant is concerned in the control of the appliances from which accident results. *Cf. Houston* v. *Brush*, 66 Vt. 331, 342. As an express messenger is not within that exception, the decision would appear to be unhappy both upon its reasoning and in its conclusion.

CHATTEL MORTGAGES — NOTICE UNDER THE RECORDING ACTS. — A commission merchant sold mortgaged cattle and remitted the proceeds of the sale to the consignor, without actual knowledge of the existence of the mortgage, which was recorded. The mortgagee sought to recover the amount of the net proceeds from the commission merchant in an action for money had and received. *Held*, that the action does not lie. *Greer* v. *Newland*, 78 Pac. Rep. 835 (Kan.).

This reverses, on rehearing, the former decision by the same court, which was adversely criticised in 18 HARV. L. REV. 54.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHTS AGAINST ACTION BY INDIVIDUALS. — The defendants took a prisoner from the custody of state officers and lynched him. They were indicted under a federal statute providing for the punishment of persons who should conspire to prevent or hinder the free exercise or enjoyment by any citizen of any right or privilege secured to him by the Constitution or laws of the United States. *Held*, that the defendants may be convicted of a conspiracy to deprive the prisoner of his right under the Fourteenth Amendment to have the state afford him due process of law. *Ex parte Riggins*, Circuit Court of the United States, N. D., Ala. N. D.

The Fourteenth Amendment operates as a guaranty only that the state shall not deprive any citizen of the United States of due process of law; and in the absence of state action, or such inaction as to amount to deprivation, it is difficult to see how any right of the citizen under the amendment can be infringed. The reasoning of the court, though ingenious, leads in effect to the conclusion that the amendment safeguards the citizen against the acts of individuals, a theory which has been expressly repudiated. *Civil Rights Cases*, 109 U. S. 3. If the decision be sound, persons conspiring to prevent a negro from voting at state elections could be punished for a conspiracy to deprive him of the right not to have state officials discriminate against him in excluding him from voting. It has been held, however, that the Fifteenth Amendment gives no authority to punish such persons. *Karem* v. *United States*, 121 Fed. Rep. 250. The leading case upon which the court relies rests only upon the power of Congress to regulate federal elections. *Ex parte Yarborough*, 110 U. S. 651; *cf. Lackey* v. *United States*, 107 Fed. Rep. 114. If the decision be upheld, the generally accepted view that the constitutional amendments leave exclusively to the states the final protection of their citizens must be substantially modified; and the limits of federal power of interference will be difficult to define. See *United States* v. *Harris*, 106 U. S. 629.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — LIMITATION OF HOURS OF LABOR. — A city ordinance provided that eight hours should constitute a day's work on any work done for the city, and that any contractor who violated this provision should be guilty of a misdemeanor. *Held*, that the ordinance is constitutional. *Broad* v. *Woydt*, 78 Pac. Rep. 1004 (Wash.).

For a discussion of the question, see 17 HARV. L. REV. 50, 419.

CONTEMPT — ACTS AND CONDUCT CONSTITUTING CONTEMPT — LIBEL OF A JUDGE AFTER SATISFACTION OF JUDGMENT. — *Held*, that a libelous article concerning a judge, published by a litigant after judgment in his cause has been rendered and satisfied, is contempt of court. *Burdett* v. *Commonwealth*, 48 S. E. Rep. 878 (Va.).

Of "constructive" contempts by publication, committed outside the presence of the court, the principal classes are those which obstruct pending proceedings, and those which discredit the court. Although, in cases of the first group, the courts *obiter* vigorously maintain their right to deal with the latter sort of offenses, it is believed that this is the first American decision to support the position squarely; and English cases are rare. See *Regina* v. *Gray*, [1900] 2 Q. B. 36; *cf. Dandridge's Case*, 2 Va. Cas. 408. Unquestionably, the common law, to preserve the independence and authority of the higher courts, invests them with an absolute power summarily to punish contempt. But how far shall that power limit the popular right to free speech? Even in England committals for scandalizing the court were recently said to be obsolete. See *McLeod* v. *St. Aubyn*, [1899] App. Cas. 549, 561. The better American decisions, recognizing our constitutional guaranties, limit constructive contempts to such publications as interfere with the progress of litigation already pending. *State ex rel. The Attorney-General* v. *Circuit Court for Eau Claire County*, 97 Wis. 1; *Neel* v. *State*, 9 Ark. 259. As practically all adjudged cases of constructive contempt, other than those by officers of the court, fall within this class, such a distinction would seem to be safe.

CONTRACTS — DEFENSES — IMPOSSIBILITY BY OPERATION OF LAW. — During the war between China and Japan the defendant carrier contracted to transport copper from New York to Yokohama. After an ineffectual attempt to withdraw from the contract on the ground that the goods at Tacoma were contraband, the carrier undertook the transportation. The government official, however, refused to clear the vessel carrying the copper on the ground that as contraband it could not legally be exported to Japan. The vessel consequently sailed without it. The following day it appeared that there was no legal objection to the exportation of the copper. *Held*, that the mistake of the official is no defense under the circumstances. *Northern Pacific Railway Co.* v. *American Trading Co.*, 25 Sup. Ct. Rep. 84. See NOTES, p. 384.

CONTRACTS — DEFENSES — IMPOSSIBILITY CAUSED BY VOLUNTARY DISSOLUTION OF PARTNERSHIP. — The defendants, who carried on business in partnership, agreed to become buying agents for the plaintiffs for a term of five years and to pay for a minimum quantity of the plaintiffs' products each year. The expressed intention was that a certain district should be represented by the defendants for that period. During the term the defendants dissolved partnership and the plaintiffs sued for breaches of the agreement committed after the dissolution. *Held*, that there was no implied term in the contract that the defendants would not disable themselves from carrying out the agreement by dissolving partnership, and therefore they are not liable. *Bovine* (*Limited*) v. *Dent and Wilkinson*, 21 T. L. R. 82 (Eng., K. B. D.).

In both England and the United States a corporation that voluntarily winds up business is liable on its contracts. *In re English Joint Stock Bank*, L. R. 4 Eq. 350; *Lovell* v. *St. Louis Insurance Co.*, 111 U. S. 264. And it is a general principle that if parties make an agreement to which effect can be given only by the continuance of an existing state of things, each impliedly engages to do nothing that will end that state. *Stirling* v. *Maitland*, 5 B. & S. 840. So firmly is this established that, although impossibility caused by law is a well-recognized excuse, it will not avail where the defendant secured the passage of the disabling law. *Re Companies' Act*, 117 L. T. 60; see 18 HARV. L. REV. 64. A partnership has recently been held not discharged from its executory contracts by a sale of its business. *Ogdens (Limited)* v. *Nelson*, [1904] 2 K. B. 410. The court seeks to distinguish the principal case by the fact that the consideration had not been given. But other cases do not require that. *Brace* v. *Calder*, [1895] 2 Q. B. 253. At most the distinction can be important only as bearing on the probability of an implied agreement; and in this case the contract seems too clear for it to have any decisive effect.

EQUITABLE ELECTION — BEQUEST BY DONEE OF POWER TO ONE ENTITLED IN DEFAULT OF APPOINTMENT — REMOTE APPOINTMENT. — A testator under a power made appointments that were too remote, and by the same will gave some of his own property to those entitled in default of appointment. *Held*, that no case of election is raised. *In re Oliver's Settlement*, 21 T. L. R. 61 (Eng., Ch. D.).

Where a testator appoints to persons not objects of a power and leaves his own property to one who would take in default of appointment, the latter is put to his election. *Whistler* v. *Webster*, 2 Ves. Jun. 367. But where the appointment fails because too remote, election has been considered unnecessary. See *Wollaston* v. *King*, L. R. 8 Eq. 165. This *dictum* applied a supposed exception that election requires one claim *dehors* the will. This is doubtful, and inapplicable to the facts of later cases. GRAY, PERPETUITIES §§ 541–559; *In re Warren's Trusts*, 26 Ch. D. 208. That case refuses election, since the remote appointment is considered *ex facie* void and therefore not to be read as part of the will. But remoteness like the objects of the power can be determined only by examining the instrument creating the power. The principal case rests squarely on the ground that as the rule against perpetuities is based on public policy it should not be circumvented. But no policy forbids one who takes at law on default to limit the property as the testator desires if he wishes to receive his legacy, provided he himself respects the rule against perpetuities. Yet that would be just the effect of election here, as in the normal case of bequeathing a legatee's property. See GRAY, PERPETUITIES § 561. The weight of authority, however, is with the principal case. *Re Beales' Settlement*, 118 L. T. 154; *contra*, *In re Bradshaw*, [1902] 1 Ch. 436; see *Graham* v. *Whitridge*, 57 Atl. Rep. 609, 615 (Md.).

EVIDENCE — DECLARATIONS CONCERNING INTENTION — POST-TESTAMENTARY DECLARATIONS OF TESTATOR ON ISSUE OF REVOCATION. — *Held*, that declarations by a testator to the effect that he was satisfied with a will are inadmissible to rebut the presumption of revocation raised by failure to produce the will. *In re Colbert's Estate*, 78 Pac. Rep. 971 (Mont.). See NOTES, p. 387.

EVIDENCE — DECLARATIONS CONCERNING INTENTION — STATEMENTS IMPLYING INTENTION TO COMMIT SUICIDE AS PROOF OF SUBSEQUENT ACT. — In an action on a life insurance policy, the defendant, in order to prove that the insured had committed suicide, sought to introduce in evidence the following declaration of the deceased made about an hour before his death: "Adolph, will you be as good a friend to my wife as you have been to me?" *Held*, that the declaration is not admissible. *Ross-Lewin* v. *Germania, etc., Co.*, 78 Pac. Rep. 305 (Col.).

In most jurisdictions declarations of intention are admitted in proof of a subsequent act, where the declarations are made under circumstances precluding the idea of misrepresentation or bad faith, and so close to the act in point of time as to render it probable that the intention was carried into execution. *Commonwealth* v. *Trefethen*, 157 Mass. 180; *Rens* v. *Northwestern, etc., Ass'n*, 100 Wis. 266. In the present case the court, while not squarely rejecting this doctrine, refuses to apply it to a case where the statement does not expressly declare the alleged intention, but merely implies it. The soundness of this decision seems doubtful; for, once admitting that the intention is a relevant fact and that it may be proved by evidence of declarations, it is difficult to see why a statement should not be admitted, which under the circumstances could reasonably be interpreted as expressing such intention. In cases of murder and arson remote and obscure allusions to the act in contemplation are often admitted to show an existing disposition or design. *State* v. *Hoyt*, 47 Conn. 518; *State* v. *Gailor*, 71 N. C. 88.

EVIDENCE — GENERAL PRINCIPLES AND RULES OF EXCLUSION — COURT'S DISCRETION TO EXCLUDE PURELY CUMULATIVE EVIDENCE. — *Held*, that in a jury trial evidence should not be excluded on the ground that testimony already introduced, if believed, amounts to proof. *Perkins* v. *Rice*, 72 N. E. Rep. 323 (Mass.). See NOTES, p. 381.

EXECUTORS AND ADMINISTRATORS — ADMINISTRATION BOND — SURETY'S LIABILITY FOR DEBT OF INSOLVENT ADMINISTRATOR. — *Held*, that the sureties on an administrator's bond are not liable for a debt which the administrator owed the estate, when he was at all times insolvent. *Buckel* v. *Smith's Administrator*, 82 S. W. Rep. 1001 (Ky.).

There is no statute in Kentucky affecting debts due the estate by the administrator. At common law the appointment of the intestate's debtor as administrator suspended action on the debt. *Ferebee* v. *Doxey*, 6 Ired. (N. C.) 448. But later the equitable presumption that what the law requires to be done has been done, was invoked, even in actions at law, to make his own debt assets in the hands of the administrator. *Crow* v. *Conant*, 90 Mich. 247. This fiction of payment has been applied to charge the surety on the administration bond with the full amount of the debt even though the debtor was insolvent when he became administrator. *Leland* v. *Felton*, 1 Allen (Mass.) 531. Since this presumption is an equitable one, however, it should be limited by considerations of fairness. The surety of the administrator did guarantee an honest administration, but he never contemplated becoming in effect a surety for past obligations; and to permit the estate to profit at his expense by the interposition of a legal fiction seems manifestly unjust. See *McCarty* v. *Frazier*, 62 Mo. 263.

EXECUTORS AND ADMINISTRATORS — PROCEEDINGS BY OR AGAINST — RIGHT TO APPEAL FROM DECISION IN FAVOR OF LEGATEE. — By an express stipulation in a will, any beneficiary contesting it was to forfeit his interest thereby. The executrix claimed that the petitioners had lost their rights under the will by a violation of this provision, and brought this appeal from an adverse order of the probate court. *Held*, that the appellant, as executrix, not being a party aggrieved, cannot have this question decided on appeal. *In re Murphy's Estate*, 78 Pac. Rep. 960 (Cal.).

Whenever obedience to the order of the probate court would subject the executor to liability it is clear that he is an interested party having the right of appeal. *In re Welch*, 106 Cal. 427; *Cheever* v. *Washtenaw Circuit Judge*, 45 Mich. 6. But where no personal liability exists, it is questionable whether the executor alone may appeal from an order of apportionment among the beneficiaries. One group of decisions holds that the executor is a party in interest, and that it is his right and duty to appeal from an order believed to be erroneous. *Ruch, Administrator* v. *Biery*, 110 Ind. 444. A majority of the decisions, however, support the principal case. *Bryant* v. *Thompson*, 128 N. Y. 426; *Merrick* v. *Kennedy*, 46 Neb. 264. The executor certainly has an interest in securing a judicial determination of questions involving distribution of property; but such interest should not necessarily extend to the enforcement of his own preconceived views, especially if the expenses of litigation rest upon the estate. Otherwise the funds intended for one beneficiary would be used in fighting the battles of another. It would seem, therefore, that in a controversy between the legatees, the right of appeal should be left with them alone.

FIXTURES — WHETHER ELECTRIC CARS ARE FIXTURES. — Under a statute authorizing the taxation of real estate, the plaintiff's electric cars were assessed. *Held*, that the assessment is illegal. *Toronto Ry. Co.* v. *City of Toronto*, [1904] A. C. 809.

In the case of steam railroads the better view, and the one supported by the weight of authority, is that the rolling stock is personalty. *Williamson* v. *New Jersey, etc., R. R. Co.*, 29 N. J. Eq. 311; *Hoyle* v. *Plattsburg, etc., R. R. Co.*, 54 N. Y. 314. This conclusion seems inevitable in view of the fact that the cars of one company are constantly being hauled over the lines of others. It would appear that the decision in the case of electric railways should be the same. An effort has been made, however, to draw a distinction upon the ground that, owing to the mode of operation by means of a continuous current of electricity passing from the wires through the cars and rails back to the generator, the cars are but parts of one great machine, which is affixed to the realty by means of its rails and power house. *Bank of Montreal* v. *Kirkpatrick*, 2 Ont. L. Rep. 113. This reasoning seems fanciful, and utterly fails to cover the case where the cars of a suburban line pass from their own tracks along those of a city company. The present decision, holding that electric cars are personalty, overrules the case last cited.

GIFTS — GIFTS MORTIS CAUSA — DONEE ALREADY IN POSSESSION. — The plaintiff's father, shortly before his death, told the plaintiff that he gave him a team of horses,

which the plaintiff already had in his possession and care, and the latter replied that he accepted the gift. His previous possession remained unchanged till the donor's death. *Held*, that it may be left to the jury to find a valid gift *mortis causa*. *Davis* v. *Kuck*, 101 N. W. Rep. 165 (Minn.).

Although the subject of the gift is already in the possession of the donee, the English and American courts agree in holding no formal act of delivery necessary to a valid gift *inter vivos*; the act of the donor in receiving back and redelivering to the donee the subject of the gift is excused as useless ceremony. *Winter* v. *Winter*, 4 L. T. R. 639; *Porter* v. *Gardner*, 60 Hun (N. Y.) 571. The present decision, following an English case, applies the same rule to gifts *mortis causa*. *Cf. Cain* v. *Moon*, [1896] 2 Q. B. 283. An American court had previously held that, without a new delivery resulting in an actual change of possession, a gift *mortis causa* is invalid. *Drew* v. *Hagerty*, 81 Me. 231. By the former rule what is virtually, though not technically, a testamentary disposition is made possible by the mere permission to the donee verbally given and accepted, to continue an existing possession with the added right of ownership. In view of the danger of fraud in gifts *mortis causa*, a formal act of delivery should be necessary to supply a substitute for the formalities of a duly executed will.

HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE — EFFECT OF MARRIED WOMEN'S PROPERTY ACTS ON ESTATE BY ENTIRETY. — Under a statute whereby a married woman could hold and dispose of property as if she were unmarried, the defendant, a married woman, undertook to harvest a crop on land of which she and the plaintiff, her husband, were tenants by the entirety. *Held*, that she will be enjoined from such action. *Morrill* v. *Morrill*, 101 N. W. Rep. 209 (Mich.).

At common law an estate by the entirety differed from a simple joint tenancy in which the husband's right of control was an incident of the marriage relation. A joint tenancy did not become an estate by the entirety upon the marriage of the joint tenants, and could be conveyed to a husband and wife without giving the rights incident to an estate by the entirety. CO. LIT. 187 b.; *Thornburg* v. *Wiggins*, 135 Ind. 178; see *In re March*, 27 Ch. D. 166, 170. In the latter estate the wife had an indestructible right of survivorship, but none to the profits during coverture. *Pray* v. *Stebbin*, 141 Mass. 219. The principal case, therefore, seems sound. Although the statute gives a wife a new right to the profits of property acquired by her before and during coverture, this is not conclusive. It gives her, to be sure, full control over what was already her own, but the essential nature of an estate by the entirety is that the wife has no present interest during coverture, and the statute does not purport to change the nature of estates. *Contra*, *Hiles* v. *Fisher*, 144 N. Y. 306.

INJUNCTIONS — ACTS RESTRAINED — ENFORCEMENT OF JUDGMENT BY DEFAULT ENTERED ON FALSE RETURN OF SERVICE. — The plaintiff brought a bill in equity to set aside a judgment at law entered against him by default, on the ground that the sheriff's return of service was false. *Held*, that except where the plaintiff at law was a party to the false return or knowingly took advantage of it, the bill will not lie. *Smoot* v. *Judd*, 83 S. W. Rep. 481 (Mo., Sup. Ct.).

The authorities on this point are equally divided. The plaintiff's only remedy at law is an action against the sheriff for a false return. *Heath* v. *Missouri, etc., Railway Co.*, 83 Mo. 617. The courts refusing equitable relief argue that judgments must be kept stable, so that all persons may safely act upon them as final. Yet, though the same argument applies, these courts will relieve against a judgment obtained by fraud, or one given by a court having no jurisdiction. *Wingate* v. *Haywood*, 40 N. H. 437; *United States, etc., Co.* v. *Reisinger*, 43 Mo. App. 571. The defendant's innocence can scarcely be a substitute for the lack of service upon the plaintiff, or act as a payment of value for the judgment whereby he is prejudiced if it be set aside. Clearly the plaintiff ought not to have to answer to this judgment, for the court giving it in reality had no jurisdiction, though it may assume to have had by making the sheriff's return conclusive. *Ridgeway* v. *Bank of Tennessee*, 11 Humph. (Tenn.) 523. The plaintiff has never been heard. Furthermore his remedy at law is inadequate, especially if the judgment in any way affects his land. It would seem, therefore, that the plaintiff should be entitled to equitable relief. *Miller* v. *Gorman*, 38 Pa. St. 309.

INSURANCE — EMPLOYERS' LIABILITY INSURANCE — RIGHT OF EMPLOYEE AGAINST INSURER BEFORE SATISFACTION OF JUDGMENT. — An employee, injured by accident, got a judgment against his employer and brought a bill against the company which had insured the latter against loss from such accidents. *Held*, that as the contract was between the insurance company and the employer, no liability arose until the latter suffered actual loss by paying the judgment, and there was no debt for the plaintiff to impound. *Finley* v. *United States Casualty Co.*, 83 S. W. Rep. 2 (Tenn.).

See 18 HARV. L. REV. 154, for a review of an article discussing the principles here involved.

INSURANCE — INSURABLE INTEREST — REASSIGNMENT OF POLICY TO PERSON WITHOUT SUCH INTEREST. — The defendant was the remote assignee of an insurance policy which had originally been assigned by the insured. Neither the defendant nor the intermediate assignees had any insurable interest in the life of the insured. *Held*, that the defendant is entitled to the proceeds of the policy. *Gordon* v. *Ware National Bank*, 132 Fed. Rep. 444 (C. C. A., Eighth Circ.).

The weight of authority supports the rule that a life-insurance policy may be assigned by the insured to an assignee who has no interest in his life. *Clark* v. *Allen*, 11 R. I. 439; *contra*, *Missouri, etc., Co.* v. *Sturges*, 18 Kan. 93. But the question whether the assignee may reassign without the consent of the insured has rarely come before the courts and seems to be still open. *Cf. Steinbach* v. *Diepenbrock*, 158 N. Y. 24; *contra*, *Thornburg* v. *Ætna, etc., Co.*, 30 Ind. App. 682. The argument urged against reassignment is that it endangers the life of the insured, by not permitting him to select a reputable assignee. Modern business conditions have, however, greatly reduced the force of this argument, which has been considered of little weight by numerous courts. See *Chamberlain* v. *Butler*, 61 Neb. 730, 738. Nor does the objection that it is void as a wagering contract apply in this case more than in that of the first assignment, for the element of wager is not increased by the fact that the insured did not assent. Furthermore, the decision in the principal case is to be desired, as it is in accordance with the tendency to render property freely transferable.

INSURANCE — MARINE INSURANCE — RIGHT OF INSURER TO SUMS RECOVERED BY INSURED. — The insured, under a valued policy, collected the insurance from the insurer after abandonment, and later recovered a larger amount from the one causing the loss. *Held*, that the insurer's right in the sum so recovered is limited to the amount which he paid to the insured. *The Livingstone*, 130 Fed. Rep. 746 (C. C. A., Second Circ.). See NOTES, p. 383.

LANDLORD AND TENANT — ASSIGNMENT AND SUB-LETTING — RIGHT OF LESSEE HAVING REVERSIONARY LEASE TO DISTRAIN. — A lessor agreed to grant the defendant, his lessee, a new lease of seventy-three years to begin on the expiration of his present term. Subsequently, a few months before the expiration of the original term, the lessee leased the premises to the plaintiff for twenty-one years. He distrained for rent in arrear before the expiration of his original term. *Held*, that the defendant has no right to distrain, as he has no reversionary interest. *Lewis* v. *Baker*, 21 T. L. R. 17 (Eng., Ch. D.).

If a lessee makes a lease for a term greater than his own, no estoppel arises between him and his tenant, because, though a tenant is estopped to deny his landlord's title when the landlord has no interest, yet when he has some interest and purports to pass a greater, the tenant can confess and avoid. *Langford* v. *Selmes*, 3 Kay & J. 220. In England such a lease operates as an assignment and leaves the assignor no reversionary interest, which is necessary to give a right to distrain. *Preece* v. *Corrie*, 5 Bing. 24. Consequently, in the principal case the defendant's lease to the plaintiff operated as an assignment, and unless he acquired a reversionary interest through the agreement of the lessor to grant him the subsequent lease, he lost his right to distrain. But a mere agreement to grant a lease gives no legal interest whatever. *Phillips* v. *Hartley*, 3 C. & P. 121. Even had the lease been granted, the defendant would have had only an *interesse termini*, which gives no reversionary interest to support the right to distrain. *Doe* v. *Walker*, 5 B. & C. 111; *Smith* v. *Day*, 2 M. & W. 684. The principal case, therefore, seems sound.

LIMITATION OF ACTIONS — OPERATION AND EFFECT — RAILWAY TICKETS. — The plaintiff offered for his passage over the defendant railway a ticket purchased fourteen years previously, which was refused. Because the plaintiff would not pay any other fare he was ejected from the train, for which he brought suit. *Held*, that there can be no recovery. *Cassiano* v. *Galveston, etc., Ry. Co.*, 82 S. W. Rep. 806 (Tex., Civ. App.).

The court argues that the statute of limitations had run against the ticket, which was therefore void. Ordinarily the statute begins to run only when a cause of action has accrued. For example, suit may generally be brought at once upon the delivery of a demand note; but where demand is a condition precedent to a cause of action, the statute begins to run only when the demand is made. *Ganley* v. *Troy, etc., Bank*, 98 N. Y. 487, 493; *Stanton* v. *Stanton's Estate*, 37 Vt. 411. Yet it has often been held that such demand, to found a cause of action, must be made within a reasonable time, generally the period of the statute of limitations. *Sheaf* v. *Dodge*, 161 Ind. 270; *Smith* v. *Smith's Estate*, 91 Mich. 7. This requirement would seem to be outside the direct operation of the statute, and to be rather based upon a condition implied in the con-

tract, the reasonable time being fixed by a convenient analogy to the limitation of actions. Such a principle is capable of wide and perhaps satisfactory results in cases such as this, where an immediate or early performance of a contract is usual and expected. The present case appears to involve a new application of the doctrine.

MANDAMUS — ACTS SUBJECT TO MANDAMUS — REFUSAL OF A COURT TO TRANSFER A CAUSE FROM THE LAW TO THE EQUITY DOCKET. — An inferior court denied the petitioner's motion to transfer a cause in which he was a party from the law to the equity docket. The petitioner prayed for a writ of *mandamus*. *Held*, that the act sought cannot be compelled by *mandamus*. *Horton* v. *Gill*, 82 S. W. Rep. 718 (Ind. T.).

It is well settled that a writ of *mandamus* may be issued to compel an inferior court as well as any other public officer to perform a purely ministerial duty. *Commonwealth ex rel. Hoopes* v. *Thomas*, 163 Pa. St. 446. It will not be issued, however, to compel a court to perform a judicial act in a particular way. *Chase* v. *Blackstone Canal Co.*, 10 Pick. (Mass.) 244. In view of the fact that before ruling upon a motion to transfer a cause from one docket to another a court must consider the facts or allegations upon which the motion is based, it would seem that the duty involved was rightly regarded as judicial rather than ministerial in the principal case. Moreover, it is well established that the existence of another remedy adequate to correct the action of an inferior court will prevent relief by *mandamus*. *Shelby* v. *Hoffman*, 7 Oh. St. 451. And it seems clear that an order upon a motion to transfer a cause from one docket to another may be reviewed by a higher court upon appeal or writ of error. *Wright* v. *Herlong*, 16 S. C. 620.

MASTER AND SERVANT — FELLOW-SERVANT AND VICE-PRINCIPAL DOCTRINES — MASTER'S LIABILITY IN MATTERS OF DETAIL. — A gang of carpenters was employed to erect temporary scaffolding on which the plaintiff, a riveter, was to work. The foreman used a defective plank, after promising the plaintiff to repair it. As a result the plaintiff was injured. *Held*, that the employer is not liable. *Hempstock* v. *Lackawanna, etc., Co.*, 90 N. Y. Supp. 663. See NOTES, p. 382.

NEGLIGENCE — DUTY OF CARE — LANDOWNER'S DUTY TO FIREMAN. — While in the defendant's building, engaged in extinguishing a fire, the plaintiff, a member of the city fire-department, was injured by the unsafe condition of the premises. *Held*, that he cannot recover. *Eckes* v. *Stetler*, 90 N. Y. Supp. 473.

All persons who enter land at the invitation of the owner on ordinary business, are entitled to be protected against the unsafe condition of the premises. *Indermaur* v. *Dames*, L. R. 1 C. P. 274. Four courts have held that a fireman who enters property to extinguish a fire is not entitled to such protection. *Cf. Beehler* v. *Daniels, etc., Co.*, 18 R. I. 563. These courts seem to consider that the predominant purpose of such an entry is to prevent the spread of the flames rather than to protect the property of the owner. Furthermore, since firemen are often authorized by statute to enter any building to extinguish a fire, courts are averse to implying an invitation to enter. It seems that the function of a fireman is twofold: to protect the owner's property and to prevent the spread of the flames. The courts might have emphasized the first element and have held that as his entry was beneficial to the owner he was an invited person. But the hardship of compelling landowners always to keep their property in a safe condition is a strong practical argument in favour of the present decision.

RAILROADS — LIABILITY TO TRESPASSER — TRESPASSER ON TRAIN INJURED BY COLLISION. — The plaintiff's intestate was a brakeman on one of the defendant's two freight trains which were halted temporarily, facing each other about fifty yards apart. After both crews had alighted, the deceased's train, because of a defective throttle, started, and collided with the other train, killing the deceased, who had boarded the locomotive of the latter for a purpose unconnected with his employment. *Held*, that a peremptory instruction may be given in favor of the defendant. *Shadoan's Administrator* v. *Cincinnati, etc., R. R. Co.*, 82 S. W. Rep. 567 (Ky.).

In the absence of proof that the rules of the company permitted the deceased to board another train, he was a trespasser. *McNamara* v. *Great Northern Ry. Co.*, 61 Minn. 296. Although by the better view employees of a train are under a duty to ascertain the presence of trespassers on their tracks, consistently with the performance of their paramount duty to protect property transported, courts very commonly deny that a similar duty is owed to adult trespassers on trains. *Grunst* v. *Chicago, etc., Ry. Co.*, 109 Mich. 342; *cf. Cincinnati, etc., R. R. Co.* v. *Smith*, 22 Oh. St. 227. A railroad does not owe to the latter class the duty of a carrier of passengers, but that of a landowner not to injure them by active negligence; and the hazardous nature of railroad business raises a duty of care to discover trespassers, the degree of which varies with

the probability of their presence. As a question of fact, however, the presence of trespassers is not so notorious on trains as on tracks, and the facts reported in the present case seem to show no neglect of the duty to anticipate the presence of the plaintiff's intestate. The same decision would apparently follow also from the fellow servant doctrine. *Greer* v. *Louisville, etc., R. R. Co.*, 94 Ky. 169.

RECEIVERS — PENDENCY OF NUMEROUS ACTIONS AGAINST CORPORATION AS GROUND FOR APPOINTMENT. — The plaintiffs' bill stated that over one hundred and eighty people were killed by the negligence of the defendant company; that one hundred and fifty suits for damages were pending against it; and that, since the plaintiffs' suit was not among the first, it was not probable that any assets would be left when their suit was decided. They therefore prayed for the appointment of a receiver to preserve the property until the rights of all the creditors should be determined. *Held*, that a receiver will not be appointed. *Slover* v. *Coal Creek Coal Co.*, 82 S. W. Rep. 1131 (Tenn.).

The power of equity to appoint a receiver has generally been exercised where the plaintiff has brought suit, and there is danger that the defendant will wrongfully dispose of his property before execution can be levied. *Vila* v. *Grand Island, etc., Co.*, 97 N. W. Rep. 613 (Neb.). The principal case, however, does not fall within this class. The plaintiffs did not ask for a receivership *pendente lite*, but sought to impound the property till all the actions should be determined. Nor does it fall within that class of cases where the purpose is to wind up a corporation, since such relief is not asked. Finally, it is not one of those exceptional instances in which the court interferes with the management of a corporation by appointing a receiver, when the assets are being wrongfully wasted. *Conro* v. *Gray*, 4 How. Pr. (N. Y.) 166. The bill therefore asked for no recognized form of relief, and the court seems justified in refusing to make an exception in this case. Although the result reduces the plaintiffs' chances of sharing in the assets, the defendant's liability in the tort actions is too conjectural to warrant virtually holding up its business pending their litigation.

RES JUDICATA — MATTERS CONCLUDED — MATTERS OF LAW. — A statute provided that railroads should not be subject to county taxes on any part of their continuous line of road. The plaintiff, a railroad, owned a bridge which had for some time been taxed by the defendant county. In 1886 the railroad had brought an action against the county to recover back these taxes. All facts concerning the bridge being conceded, the court had found that it was not a part of the continuous line within the meaning of the statute. In subsequent suits between different parties this construction had been held erroneous. The present action was brought upon the same conceded facts to restrain the county from assessing the bridge for the year 1901. *Held*, that the matter is not *res judicata*. *Chicago, B. & Q. R. R.* v. *Cass County*, 101 N. W. Rep. 11 (Neb.). See NOTES, p. 389.

RULE AGAINST PERPETUITIES — INTERESTS SUBJECT TO THE RULE — OPTIONS TO PURCHASE FEE. — A lease for ninety-nine years contained a covenant that the lessee might, at any time during the term, purchase the fee. *Held*, that the covenant is void as contravening the rule against perpetuities. *Woodall* v. *Clifton*, 39 Law Jour. 644 (Eng., Ch. D.). See NOTES, p. 379.

SALES — RIGHTS AND REMEDIES OF BUYERS — RIGHT OF INSPECTION IN SALES C. O. D. — *Semble*, that a valid tender of goods sent C. O. D. cannot be made without allowing inspection. *Thick* v. *Detroit, etc., Ry. Co.*, 101 N. W. Rep. 64 (Mich.). See NOTES, p. 386.

SET-OFF AND COUNTERCLAIM — CLAIM IN ASSUMPSIT ON WAIVER OF TORT. — To an action on a note the defendant pleaded a set-off of the money received by the plaintiff through the wrongful conversion and sale of property of the defendant's intestate. *Held*, that, although the defendant might have waived the tort and sued in assumpsit, the claim cannot be set off under a statute allowing set-off of claims "under contract" or "damages for breach of contract." *Heyman* v. *Thomas*, 32 Wash. Law Rep. 792 (D. C.).

Statutes of set-off in most jurisdictions are interpreted so as to allow such a set-off as was claimed here. The conflict in the decisions seems to come from a difference of interpretation rather than from any real distinction between the statutes, though their wording often varies. Indiana, with a statute allowing set-off of claims arising "out of debt, duty, or contract," agrees with the principal case. *Richey* v. *Bly*, 115 Ind. 232. Kansas, allowing set-off of a "cause of action arising upon contract," reaches a contrary result. *Challiss* v. *Wylie*, 35 Kan. 506. On a strict construction of the wording of the statute in the District of Columbia, the decision of the court may be justified,

but the result is undesirable and the rule of most jurisdictions seems better. Set-off statutes, being remedial in their nature, should be liberally construed, both in the interest of justice to defendants and to prevent multiplicity of suits. *Sargent* v. *Southgate*, 5 Pick. (Mass.) 312.

STATUTES — INTERPRETATION — WHO IS CHINESE LABORER UNDER EXCLUSION ACT. — The Chinese Exclusion Act of May 5, 1892, provided for the deportation of any Chinese laborer not having a certificate of residence as therein prescribed. The petitioner, who was arrested under the above act, was born in England of a Chinese father and an English mother, but had been residing in this country for twenty-four years. He petitioned for a writ of *habeas corpus*, on the ground that he was not a Chinese laborer within the meaning of the act. *Held*, that the term "Chinese laborer" means a person whose father and mother are both of the Chinese race. *United States* v. *Sam Yuen*, 37 Chi. Leg. N. 117 (U. S. Dist. Ct., S. D. N. Y.).

As the question here involved arises for the first time, it is necessary, in order to find analogies, to examine the decisions relating to negroes and Indians. The former class of cases is of little aid, being based mainly upon statutes providing that a person having one-fourth, or one-eighth, negro blood shall be deemed of that race. Other decisions regard the predominating blood as determining the race. *Lane* v. *Baker*, 12 Oh. 237. And again, in some jurisdictions, the distinction is made between negroes and colored persons of mixed blood. *Frasher* v. *The State*, 3 Tex. App. 263. Decisions relating to Indians furnish a better analogy, being free from statutory limitations. Here it is generally held that the race of the father determines that of the children. *Ex parte Reynolds*, 5 Dill. (U. S. C. C.) 394. But upon a strict definition it has been decided that a half-breed is neither white nor Indian. *In re Camille*, 6 Saw. (U. S. C. C.) 541. Since the principal case is one that would involve great hardship to the petitioner, the rule of strict interpretation should be applied. *Farmers', etc., Bank* v. *Dearing*, 91 U. S. 29. If the immigration of Chinese half-breeds is undesirable, the remedy lies in Congressional enactment.

SURETYSHIP — SURETY'S DEFENSES: EXTINCTION OF PRINCIPAL OBLIGATION — SURETY'S RIGHT TO CONTROL APPLICATION OF PAYMENTS. — The defendant, indebted to the plaintiff, among other items, for materials used on a city contract, paid him certain sums received from the city, which the plaintiff applied to another account with notice of the source of the payment, and then joined the surety on the defendant's bond in a suit for the price of the materials. *Held*, that the surety is equitably entitled to have the payment applied in satisfaction of the debt on which he was liable. *Crane Co.* v. *Pacific, etc., Co.*, 78 Pac. Rep. 460 (Wash.).

Although in general when one owing several debts to a creditor, pays him money without directing its application in any particular manner, the latter may appropriate it to either of the debts, still in certain cases where the sum paid is a specific fund, the payment of which is secured by sureties, they are entitled to have the money used in discharging the secured claim. *Porter* v. *Stanley*, 47 Me. 515. The burden, however, is upon the surety to prove that payment is made from such specific fund. *Merchants' Insurance Co.* v. *Herber*, 68 Minn. 420. In the principal case, as the sum due the plaintiff was much less than the contract price owed by the district, it is difficult to say that any part of the larger sum is to be specifically paid in satisfaction of the secured claim, and is not applicable to other indebtedness. If the defendant has full control over the money and can use it as he chooses, the surety is not equitably entitled to have the payments applied to his debt. *Board, etc., of Redwood County* v. *Citizens' Bank*, 67 Minn. 236.

TAXATION — EXEMPTION — MUNICIPAL PROPERTY. — *Held*, that the bonds of a lighting company given to the city in consideration for its gas plant are not exempt from state taxation as "public property used for public purposes," although the income from them is used in lighting the streets. *City of Frankfort* v. *Commonwealth*, 82 S. W. Rep. 1008 (Ky.). See NOTES, p. 385.

WITNESSES — PRIVILEGED COMMUNICATIONS — PHYSICIAN: WAIVER OF PRIVILEGE. — In a contest concerning the validity of a will, a devisee under an earlier will sought to introduce the testimony of the testatrix's attending physician as to her mental capacity. By statute, communications from a patient to his physician were privileged. *Held*, that the evidence is inadmissible. *In re Hunt's Will*, 100 N. W. Rep 874 (Wis.).

The general rule is that statutory provisions designed for the benefit of individuals may be waived by those entitled to their protection. *State Trust Co.* v. *Sheldon*, 68 Vt. 259. Hence it is agreed that the patient may waive the privilege. See *Thompson* v. *Ish*, 99 Mo. 160, 176. There is a conflict, however, with regard to the existence of this

right after the patient's death. In some jurisdictions it is extended to his personal representatives and devisees, and in others to his heirs. *Fraser* v. *Jennison*, 42 Mich. 206; *Winters* v. *Winters*, 102 Ia. 53. On the other hand, the court above confines the right to the patient alone. This result seems sound. As the court points out, the purpose of the statute is personal — to encourage full and confidential disclosure to the physician of all facts necessary to a proper treatment. To this end it is essential that after the patient's death the seal of secrecy should remain unbroken. While it is true that an executor represents the deceased, he does so only with regard to rights of property, and not with reference to those which pertain to person and character. *Westover* v. *Ætna, etc., Co*, 99 N. Y. 56.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

BASIS OF LIABILITY OF PRINCIPAL FOR ACTS OF AGENT WITHIN THE APPARENT SCOPE OF HIS AUTHORITY. — Considerable discussion has arisen among text-writers as to the ground on which a principal is to be held liable for acts of his agent within the apparent scope of his authority. Mr. Ewart bases liability solely on estoppel. EWART, ESTOPPEL BY MISREPRESENTATION. In answer to this view, which is supported by a number of authorities, a recent article maintains that the principal is held on a purely contractual basis. "*Agency by Estoppel*," by Walter Wheeler Cook, 5 Columbia L. Rev. 36 (Jan. 1905).

The writer, after laying down the rule of contracts that expressed assent governs and secret intention unexpressed is ineffective, states the proposition that one may make a contract by expressing intention through an agent as well as by letter. Further, although the agent's authority is only apparent, yet the principal is bound by the intention expressed, not on the ground of estoppel but because in law they are the words of the principal. In short, his result is, that a person representing his agent to be clothed with certain authority, thereby manifests an intention to be bound by the acts of such agent, and where a third party enters into an agreement with the agent, the principal is bound by this manifested intention, even though it is contrary to the instructions given the agent. Finally, he points out that in the case where the third party enters into an executory agreement and has done nothing to alter his position, the two theories do not lead to the same result; for under the estoppel theory neither party would be bound. Unfortunately no case is cited deciding this question, although the law is stated to be that both parties are bound. Probably no decision has involved the point. It might further have been pointed out that under the estoppel theory, as the estoppel would not bind the third party, he could never be bound unless the principal ratified before the third party chose to withdraw, although that precise case does not seem to have arisen. Again the two theories would reach different results where the third party had no knowledge of the apparent scope of the authority and so could not be said to rely on any representations.

The article illustrates the danger of this unsatisfactory phrase, "apparent authority." At times it is used by the courts and text-writers to mean what is better termed "incidental authority," and then again is extended to cases where the only ground of liability seems to be estoppel. As an example of the former, a person in charge of a store may be said to have "incidental authority" to sell any of the goods, in spite of private instructions to the contrary. However, if X is appointed my agent only to sell my black horse, but I tell Y that X is authorized to sell my white horse and then X gets my white horse without my knowledge and sells it to Y, it would seem clear that X was not really my agent at all, and yet I am estopped to deny it. Some of Mr. Cook's language is broad enough to include such a case within apparent authority. If he means that, then logically he should go the next step and say that even where X has never been appointed my agent for any purpose, but I tell Y that he is my agent and Y deals